

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR
BENCH, JAIPUR.

J U D G M E N T

Kanha

Vs.

Kalu & others

S.B. CIVIL FIRST APPEAL No.143/1986
against the judgment & decree dated
dated 5.3.1986 passed by the District
Judge, Bundi in Civil Suit No.1/1982.

Date of Judgment :: August 4th, 2006

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Vinod Kumar Tamoliya for Mr. N.K. Maloo for the
appellant.
None present for respondent Nos.1, 2 & 3.
Mr. Sanjay Mehrishi for respondent Nos.4 to 6.

REPORTABLE

BY THE COURT:

1. The suit filed by Kanha Meena son of Shri Kishan Meena for cancellation of gift deed whereby he is alleged to have gifted away his entire immovable and movable property to his daughter's son Kalu, was dismissed by the learned District Judge, Bundi by the impugned judgment dated 5.3.1986 and being aggrieved by the same, the plaintiff Kanha (since deceased) is in appeal before this Court.

2. Kanha at age about 65 years is said to have executed

Ex.A.1 gift deed on 28.1.1972 in favour of defendant Kalu who was minor of about 12-13 years and was son of eldest daughter of Kanha Smt. Keshar wife of Bhanwar Lal and the said gift deed (Bakhshishnama) was drafted by Kapur Chand Nuwal, Advocate Dw.5, on 28.1.1972 when Smt. Keshar and her husband Bhanwar Lal, defendant Nos.2 & 3 along with defendant No.1 Kalu brought the plaintiff Kanha to Bundi when he was suffering from some illness as he was living in village Maija, they came for treatment of plaintiff Kanha to nearby town Bundi and got the said gift deed executed and signed by thumb impression by plaintiff Kanha. By the said gift deed the entire property belonging to plaintiff Kanha including the agricultural land of about 54 bighas and one residential house valued at Rs.10,000/- were given in gift to his minor grand-son defendant Kalu. It may be stated here that the plaintiff Kanha had other three daughters also Smt. Gopali, Smt. Kisturi Bai and Smt. Prem Bai who did not have any issue at that time and his own wife Smt. Modi Bai. He had no male issue and the husband of Smt. Keshar and the said daughter were living in the house of plaintiff Kanha only and, therefore, out of natural love and affection for the only grand-son defendant Kalu, the said gift was made in his favour.

3. The plaintiff came with the case before the court that

he was never informed as to the character of document and whether it was a gift deed or a will and since he was seriously ill around at that time when he was brought to Bundi by the said defendants Smt. Keshar, his eldest daughter and her husband Bhanwar Lal, they prompted him to execute the necessary document in favour of their son defendant Kalu for transferring his entire property in favour of defendant Kalu because Kanha was seriously ill and lest something happens to him, he should execute such deed at that time. The said person Kanha being illiterate and old man of about 65 years at that time though had natural love and affection for his grand-son defendant Kalu was thus led to execute the said deed Ex.A.1 but according to the plaintiff he categorically stated to the defendants as well as Advocate Dw.5 Mr. Kapur Chand Nuwal that his property during his own life time shall remain with him and after his death should go to defendant Kalu.

4. In the plaint the plaintiff had also stated that earlier he had executed a will in favour of his daughter Smt. Keshar but on account of misbehavior by the said daughter towards him, he had cancelled the said will by tearing it apart.

5. The case further in the plaint is that after few years

of the said event the defendants started misbehaving and ill-treating plaintiff Kanha and did not take any care of his food and other requirements and the defendant Kalu had even filed a suit on 30.9.1980 in respect of the said property seeking injunction against disbursing his possession and enjoyment of the said property against Kanha and other daughters of Kanha. In the meanwhile the other daughters were also blessed with children. The plaintiff, therefore, claimed in the plaint that he came to know of the said document Ex.A.1 to be a gift deed only on 12.12.1980 when he applied for a certified copy of the said document and obtained the same from the office of Registrar where the said gift deed during the contemporary period was registered on 29.1.1972 itself and, therefore, he wanted cancellation of the said gift deed which he never intended to execute as gift deed but at that time had explicitly made it clear that it should be a will from his side. He further claimed that the said document was got executed under undue influence by the eldest daughter Smt. Keshar in whose active confidence the plaintiff was without disclosing the true character of the document nor the same was read over or explained to him by the person who drafted the same namely Dw.5 Kapur Chand Nuwal, Advocate and, therefore, the said document deserves to be cancelled.

6. The said plaintiff unfortunately died during the pendency of this appeal on 18.5.1988 whereas this appeal was filed in this Court on 30.6.1986 and thereafter the legal heirs namely the wife and three other daughters were taken on record by the order of this Court dated 15.11.1988. Later on wife of Kanha Smt. Modi Bai and defendant No.3 Smt. Keshar are also said to have died and, therefore, their names were deleted from the array of appellants/ respondents by order dated 25.1.2006. In the meanwhile part of the said agricultural land is said to have been sold by defendant No.1 Kalu in favour of Gopal, Smt. Pushpa and Chhitar and on an application under Order 1 Rule 10 CPC, they were also impleaded as respondents in this appeal vide order dated 10.1.1989.

7. The said suit for cancellation of the gift deed was dismissed by the learned District Judge as aforesaid.

8. Five issues framed by the learned trial court were as under:-

(1) "Whether the plaintiff had become seriously ill 10 years prior to filing of the suit and for his treatment had come to Bundi?

(2) Whether during the said illness the plaintiff asked the defendant Smt. Keshar and Bhanwar Lal to get

executed his will in favour of defendant Kalu but these defendants by fraud got executed instead a gift deed which came to the knowledge of the plaintiff on 12.12.1980?

(3)Whether the plaintiff continued to remain in possession of the disputed agricultural land and the residential house?

(4)Whether the court had jurisdiction to try the suit for permanent injunction in respect of the agricultural land in question?

(5)Relief?"

9. The learned trial court decided issue No.1 against the plaintiff holding that the plaintiff had failed to prove that about 10 years prior to filing of the suit he had fallen seriously ill and had come to Bundi for his treatment. The issue No.2 was decided against the plaintiff holding that the plaintiff had failed to prove that the defendants had got executed the gift deed in the state of serious illness and either he had asked the defendants Smt. Keshar and Bhanwar Lal to get executed a will in favour of defendant Kalu but they by fraud got executed a gift deed. The issue No.3 was decided by holding that the plaintiff solely was not in possession of the agricultural land and residential house in question and both defendant Kalu and plaintiff were in joint possession of the said property and for last 1 ½ years the plaintiff was not in possession. The issue No.4 regarding jurisdiction was not pressed,

therefore, the court decided that the court has jurisdiction to try the suit. Accordingly, the suit was dismissed.

10. Mr. Vimal Kumar Tamoliya, appearing for Mr. N.K. Maloo, counsel for appellants vehemently submitted before this Court that the learned trial court has erred in deciding issue No.1, 2 & 3 against the plaintiff appellants. He urged that plaintiff Kanha was an old aged person of about 65 years of age and was seriously ill at the time when the document in question Ex.A.1 is said to have been executed by him and he being under influence of such serious illness out of emotion though for his natural love and affection for his only grand-son at that time defendant Kalu wanted to give his property by way of will to him but the defendant Nos.2 & 3 Smt. Keshar, his eldest daughter and her husband Bhanwar Lal who were living in his house since their marriage, played a fraud and through their Advocate Dw.5 Kapur Chand Nuwal who was the lawyer for said Bhanwar Lal in other cases also, got a gift deed executed instead of a will and this character of the document Ex.A.1 being a gift deed was never made known to him. He alternatively submitted that where the parties are admittedly in close relation and the plaintiff, old person was living with his own daughter and son-in-law in his own

house, therefore, he was a man in active confidence with them and, therefore, according to Section 111 of the Indian Evidence Act, the burden of proof lies upon these defendants to show that the document in question was executed in good faith and fully explained and read over to him and he was fully conscious of the character of the document and in the absence of such burden of proof having been discharged by these defendants by having acted in complete good faith, such document shall be void in law and the defendants could not claim any title over the property in question. He further urged that the very fact that the defendant Kalu filed a civil suit for injunction in respect of the same property on 30.9.1980 and started misbehaving and did not even take care of food and other basic requirements of the plaintiff Kanha clearly showed that the defendants were only interested in the property of plaintiff Kanha and not the least for his well being and it is only after coming to know of the nature and document after obtaining a certified copy of the same on 12.12.1980, the plaintiff came to know of the fraud played upon him and, therefore, he filed a suit for cancellation of the gift deed which deserve to be decreed and, therefore, he submitted that the learned trial court has erred in rejecting the suit and the judgment under appeal, therefore, deserves to be set aside.

11. He relied upon the judgment of Hon'ble Supreme Court in **Krishna Mohan Kul @ Nani Charan Kul & anr. Vs. Pratima Maity & ors** [2004 (1) WLC (SC) 319] wherein the Hon'ble Supreme Court held that a person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable.

12. Further relying on a latest decision of the Hon'ble Supreme Court in **Prem Singh & ors Vs. Birbal & ors** {(2006) 5 SCC 353], learned counsel submitted that fraudulent misrepresentation as regards 'character of a document' render the document void but fraudulent misrepresentation as regards contents of a document renders it voidable. He, therefore, submitted that since 'the character of document' in question in the present case, was fraudulently misrepresented to him to be a will though it was executed as a gift deed, the said document was void and, therefore,

could not enure to the benefit of the defendants.

13. He drew strength by resort of Section 16 of the Contract Act rendering contract under undue influence as void from a Privy Council judgment in **Daing Soharak Binte Daing Tadaleh & anr. Vs. Chabak Binte Lasaliho & anr.** {AIR 1927 Privy Council 148] wherein **Lord Viscount Haldane** held as under:-

“The relief given by a Court of Equity is a secondary consequence of the principle that a person, standing in a relationship in which authority or influence may be supposed to exist, cannot hold a mere gift without making it clear that the intention to make it was not the result of his influence. The relationship itself does not necessarily preclude the making of the gift; but the burden lies on the donee to show that there was no such influence as to the source of the gift.....
But he can discharge the burden incumbent on him by showing that the relationship notwithstanding, the donor knew completely what he was doing, and acted of his own completely free will. With certain kinds of fiduciary relations, such as that of a solicitor taking a gift from his client, this is, obviously, much more difficult to establish than in others where the duty is less definite. Courts of Equity have therefore, exercised a certain freedom in their decisions as to where and how the principle must be applied. This appears to their Lordships to be the outcome of numerous authorities which they have examined.”

14. One need not multiply authorities, but the other judgments on Section 16 and Section 111 of Indian Evidence Act like **Selvarasu Kounder Vs. Sahadeva Kounder** {AIR 1998 Madras 58}; **Mrs. Nellie Wapshare & ors Vs. Pierce Leslie & Co. Ltd. & ors.** [AIR 1960 Madras 410]; **Balram Kirar through L.Rs. Vs. Ramkrishna & anr.** [AIR 2002 Madhya Pradesh 139]; and **Sri Kishore Ray Thakur Bije Vs. Smt. Basanti Kumar Das & ors.** [AIR 1994 Orissa 113] clearly establish the principle that unless an old, illiterate and ailing person is fully made aware of the character and contents of document attributed to him to which has been executed by him after becoming fully aware of it, such burden of beneficiary under such document that it was got done absolutely in good faith is discharged, the document cannot be held enforceable against such person.

15. Section 111 of the Indian Evidence Act provides as under:-

"111. Proof of good faith in transaction where one party is in relation of active confidence. - Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a

position of active confidence."

16. In **Mst. Kharbuja Kuer Vs. Jangbahadur Rai & ors.** [AIR 1963 SC 1203], the Hon'ble Supreme Court while dealing with a case of Indian 'pardanashin' ladies held entitled to a special protection in view of the social conditions of the times held that the burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction. The said principle was extended and applied to the old, illiterate and ailing persons unable to comprehend the nature of the contents of a document by the Hon'ble Supreme Court in Krishna Mohan Kul's case (supra).

17. From the side of defendants in the present appeal nobody appeared before this Court at the time of hearing of this appeal, though Mr. G.L. Sharma, Advocate has appeared for such defendants on earlier dates, except for the subsequent purchasers of the part of the agricultural land who were represented by Mr. Sanjay Mehrishi who advanced his arguments within the limited periphery, which he could.

18. Having heard the learned counsel, this Court is of the opinion that the present appeal deserves to be allowed and the judgment under appeal and decree rejecting the suit of the plaintiff Kanha deserves to be set aside for the following reasons.

19. The fact that plaintiff Kanha was over 65 years of age and was an illiterate person are not in dispute. His illness at the particular time on 28.1.1972 may be in dispute and may not have been proved by the plaintiff as held by the learned trial court but nonetheless in his statement recorded before the court as Pw.1 the said plaintiff Kanha had clearly stated that when they came to Bundi he was brought there by saying that his condition was serious and he will have to be given some injections and for the property his daughter Smt. Keshar told him to execute the necessary papers in favour of her son defendant Kalu whereupon the plaintiff said that it may be done so but his property will remain with him during his life time and after his death the land will vest with defendant Kalu. He further clearly stated that he was illiterate and on document on which he gave his thumb impression was neither read over nor explained to him and the day he went to Bundi he was taken to the court premises where he gave his thumb impression and the said document was got registered with

the Collector, Bundi. The fact that the expression of plaintiff Kanha that the property in question will remain with him during his life time and could vest in defendant Kalu only after his death and this assertion in plaint as well as in statements having gone un-rebutted clearly shows that the 'character of document' which he understood executed in Bundi was a will and could not be treated as a gift deed. Gift, as is well settled, is 'inter-vivos' and the possession of the property is also handed over to the donee immediately. The gift should be made out of the natural love and affection for the donee. It should be without consideration and the gift should be duly accepted by the donee. While it can be gathered from the facts available on record and evidence that the plaintiff Kanha expressed his desire to give away his property to his grand-son Kalu but it was only by way of will which could be operative after his death. The said plaintiff never wanted to immediately part with his rights in the said property and possession thereof in favour of defendant Kalu who was admittedly the minor child of 12-13 years at that time. Therefore, he was obviously not made fully aware and conscious of the 'character of document, Ex.A.1 to be a gift deed at that time and, therefore, the said document as such cannot be construed to be gift deed enforceable as such against plaintiff Kanha. The burden of proof has not

been discharged by the defendant in the present case as is envisaged by Section 111 of the Evidence Act. As a matter of fact, neither any specific issue casting such burden on the defendants has been framed by the learned trial court nor any such material has come on record which could establish the discharge of such burden by the defendants in any manner. Dw.5 Kapur Chand Nuwal, Advocate who drafted the said document and was examined by the court has given in his statement that it was wrong to say that Kanha had said that defendant Kalu should become owner of his property after his life time, and the said witness has also stated that the said gift deed was drafted upon the instruction of Kanha and after getting the draft typed he got it signed, they went for registration of the said document and with Kanha at that time his daughter Smt. Keshar and Bhanwar Lal had also come to him. The said witness has admitted that he had been advocate representing Bhanwar Lal in other cases also. It appears from the statement of said Dw.5 Kapur Chand Nuwal that his averments that Kanha did not tell him that he should draft necessary papers for making defendant Kalu as owner of his property after his life time cannot be said to be more clinching and firm evidence in a statement of an advocate recorded after 14 years of the drafting of a particular document as to what were the exact words of instruction by plaintiff Kanha

rather than the evidence of plaintiff himself that he expressed his desire to make defendant Kanha the owner of property only after his life time, the later i.e. evidence of Kanha appearing to be more natural and normal course of action on the part of an old and an illiterate person who had only daughters and no male heir and only grand-son at that time. Therefore, this Court is of the opinion that the burden of proof has also not been discharged by the defendants in accordance with Section 111 of the Evidence Act in the present case. The issue No.2 is thus, decided in favour of the plaintiff Kanha.

20. In view of the foregoing discussions, this Court is of the opinion that Ex.A.1 document cannot be held to be a gift deed enforceable as such against the plaintiff and the learned trial court has erred in rejecting the suit for cancellation of such gift deed at the instance of plaintiff. This is not to hold that said document can be said to be the will of plaintiff Kanha per se. As a result of this, the entire property shall be deemed to revert back to the plaintiff Kanha.

21. The present appeal is accordingly allowed, the judgment under appeal of the learned District Judge, Bundi dated 5.3.1986 is set aside and the suit filed by the

plaintiff Kanha is decreed in his favour. The document Ex.A.1, the gift deed will be treated as cancelled. No order as to costs.

(Dr.VINEET KOTHARI),J.

VS/